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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIOLETTA ETTARE,

Plaintiff,

vs.

JOSEPH E. BARATTA, an individual, TBIG FINANCIAL SERVICES, INC., form of business unknown, WACHOVIA SECURITIES, LLC, a Delaware Limited Liability Company, MARK WIELAND, an individual, and DOES 1-25,

Defendants.

Case No. C-07-04429-JW (PVT)

DEFENDANTS' JOINT OPPOSITION TO MOTION TO REMAND

Date: Monday, December 3, 2007
Time: 9:00 a.m.
Place: Courtroom 8, 4th Floor

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MISCELLANEOUS

Defendants WACHOVIA SECURITIES, LLC ("Wachovia"), MARK WIELAND ("Wieland"), TBIG FINANCIAL SERVICES, INC. ("TBIG") and JOSEPH E. BARATTA ("Baratta") (collectively, "Defendants") hereby oppose Plaintiff DR. VIOLETTA ETTARE's ("Plaintiff" or "Dr. Ettare") Motion to Remand.

I.

INTRODUCTION

On or about July 13, 2007, Dr. Ettare filed her complaint against Defendants in the Santa Clara County Superior Court. On August 27, 2007, Wachovia and Wieland filed a notice of removal removing Dr. Ettare's state court action to this Court (the "Removal Notice"). Dr. Ettare challenges the Removal Notice on the following grounds: (1) Wachovia failed to allege the citizenship of each of its members as required by the Ninth Circuit's recent opinion in Johnson v. Columbia Properties Anchorage, L.P., 437 F.3d 894 (9th Cir. 2006); (2) TBIG did not have the legal capacity to join in the Removal Notice; and (3) TBIG potentially has a Californian principal place of business.[1] Based on these grounds, Dr. Ettare claims Defendants failed to meet their burden of establishing complete diversity of citizenship of the parties and requests this Court to remand this action to the Santa Clara County Superior Court.

The Removal Notice's failure to allege the citizenship of Wachovia's members does not warrant the remand of this action. The Removal Notice's allegations regarding Wachovia's citizenship are merely defective. The allegations set forth the proper statutory basis and legal theory for removal but failed to specify all the necessary facts to support the removal. However, the facts necessary to support the removal existed at both the time Dr. Ettare filed her complaint in the Santa Clara County Superior Court and when the Removal Notice was filed, namely, that Dr. Ettare and each of Wachovia's members are citizens of different states. These allegations can be

[1] Plaintiff did not challenge the Removal Notice's allegations concerning Wieland's and Baratta's citizenship.

cured at any time under 28 U.S.C. § 1653.[2] To remand this case would prioritize form and "legal flaw-picking" over the "orderly disposition of cases properly committed to federal courts." See Barrow Dev. Co. v. Fulton Ins. Co., 418 F.2d 316, 318 (9th Cir. 1969).

Dr. Ettare's claim that TBIG did not have the legal capacity to join in the Removal Notice has no grounds, given that the revocation of a corporation's status does not terminate its existence. Moreover, TBIG has since reinstated its status as a Nevada corporation, and that reinstatement "relates back to the date on which the corporation forfeited its right to transact business . . . and reinstates the corporation's right to transact business as if such right had at all times remained in full force and effect." NEV. REV. STAT. § 78.180(5). Thus, even if TBIG did not have capacity to join the Removal Notice at that time, the reinstatement of its status on August 31, 2007 validated TBIG's joinder. Dr. Ettare's claim that TBIG's principal place of business is in California also lacks support, and any questions concerning TBIG's Nevada citizenship can be clarified.

Accordingly, this Court should deny Plaintiff's Motion to Remand on the basis that the Removal Notice's defective allegations regarding Wachovia's citizenship can be cured, TBIG had capacity to join the Notice of Removal, and Defendants have met their burden of demonstrating complete diversity.

II.

STATEMENT OF FACTS

As noted in Defendants' Removal Notice, at the time the above captioned action was commenced on July 13, 2007, and the time Defendants filed the Removal

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[2] Defendants have filed a motion for leave to amend the Removal Notice pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1653 in conjunction with this Opposition. This practice is recognized in courts of this circuit. See Nat'l Audubon Soc'y v. Dep't of Water & Power of the City of L.A., 496 F. Supp. 499, 502 (E.D. Cal. 1980) (in response to a motion to remand, defendant filed both an opposition and a motion to amend its removal notice under 28 U.S.C. § 1653).

Notice on August 27, 2007, and at all times thereafter, Wachovia was and is a limited liability company organized under the laws of Delaware, having its principal place of business in Richmond, Virginia. (See Declaration of Terry Ross in Support of Amended Notice of Removal of Action ("Ross Decl."), ¶ 5, filed concurrently herewith; see also Declaration of Paul Waldman in Support of Opposition to Plaintiff's Motion to Remand and Motion for Leave to Amend Removal Notice ("Waldman Decl.") ¶ 3, filed concurrently herewith.) Wachovia is, and has been since before July 13, 2007, 100% owned by Wachovia Securities Financial Holdings, LLC ("WSFH"). (Waldman Decl., ¶ 4.) Since before July 13, 2007, Wachovia's sole member, WSFH, was a citizen of a state other than California. WSFH was organized under the laws of the State of Delaware. (Waldman Decl., ¶ 5.) WSFH's principal place of business is located in Richmond, Virginia. (Waldman Decl., ¶ 5.)

Since before July 13, 2007, and at all relevant times, WSFH consisted of two members: Wachovia Securities Holdings LLC ("WSH") and Prudential Securities Group, Inc. ("PSG"). (Waldman Decl., ¶ 6; see also Declaration of Kenneth Meister in Support of Opposition to Plaintiff's Motion to Remand and Motion for Leave to Amend Removal Notice ("Meister Decl.,") ¶¶ 2, 3, filed concurrently herewith.) WSH and PSG were and are citizens of states other than California. First, WSH has been organized under the laws of the State of Delaware since before July 13, 2007. (Waldman Decl., ¶ 7.) WSH's principal place of business is located in Charlotte, North Carolina. (Waldman Decl., ¶ 7.) Second, PSG was incorporated under the laws of the State of Delaware. (Meister Decl., ¶ 4.) PSG's principal place of business is located in New York. (Meister Decl., ¶ 4.)

Since before July 13, 2007, WSH has been owned entirely by Everen Capital Corporation ("Everen"). (Waldman Decl., ¶ 8.) Everen, WSH's sole member, has been a citizen of state other than California since before July 13, 2007. Everen was incorporated under the laws of the State of Delaware and its principal place of business is located in Charlotte, North Carolina. (Waldman Decl., ¶ 9.)

At the time the above captioned action was commenced on July 13, 2007, and the time Defendants filed the Removal Notice on August 27, 2007, and at all times thereafter, Joseph Baratta and TBIG have been citizens of Incline Village, Nevada. (See Declaration of Joseph E. Baratta in Support of Amended Notice of Removal and in Opposition to Plaintiff's Motion to Remand and Motion for Leave to Amend Removal Notice ("Baratta Decl."), ¶¶ 2, 5, filed concurrently herewith.)

Baratta and his wife bought their home in Nevada in 2000, and although they still own a second home in California, it is currently leased, and they have been Nevada residents since 2001. (Baratta Decl., ¶ 3.) Baratta files his and TBIG's taxes in Nevada, is registered to vote with the State of Nevada, his daughter attends school full time at the Lake Tahoe School in Incline Village, Nevada, and Baratta is a member of the Board of Trustees and Chairman of the Finance Committee for his daughter's school. (Baratta Decl., ¶¶ 3, 4.)

TBIG is a corporation incorporated under the laws of the State of Nevada, having its principal place of business at 756 Lakeshore Boulevard, Incline Village, Nevada. (Baratta Decl., ¶ 5.) Although TBIG had been a California corporation, it ceased to be so on November 27, 2000 when it merged into the Nevada corporation. (Baratta Decl., ¶¶ 5, 6, Exhibits A, B and C.) Baratta is the sole officer and director of TBIG. (Baratta Decl., ¶ 7.)

TBIG's form ADV lists a 650 area code cellular phone as TBIG's primary contact information because that number works internationally, whereas TBIG's original 877 number did not. (Baratta Decl., ¶ 8.) That 650 cellular phone is billed to Baratta's address in Nevada. (Baratta Decl., ¶ 8.) The two 650 telephone and fax numbers on Schedule D, page 1 of the form ADV attached as Exhibit A to Cooke's Declaration relate to the location where TBIG kept certain books and records other than its principal place of business. (Baratta Decl., ¶ 8.) Those numbers are no longer utilized by TBIG. (Baratta Decl., ¶ 8.)

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Baratta was served with Dr. Ettare's complaint on August 3, 2007 at his home in Nevada. (Baratta Decl., ¶ 9.) At some point soon thereafter, he became aware that TBIG had inadvertently failed to make certain filings required by the Nevada Secretary of State and that TBIG's status as a Nevada corporation had been revoked on November 1, 2002. (Baratta Decl., ¶ 9.) Baratta immediately took the steps necessary to reinstate TBIG's corporate charter, which was accomplished by August 31, 2007. (Baratta Decl., ¶ 9, Exhibit C.)

III.

ARGUMENT

A. THIS ACTION SHOULD NOT BE REMANDED BECAUSE THE REMOVAL NOTICE'S ALLEGATIONS REGARDING WACHOVIA'S CITIZENSHIP CAN BE AMENDED.

1. Defendants' Motion For Leave To Amend The Removal Notice Is Timely Under 28 U.S.C. § 1653.

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. In other words, "28 U.S.C. § 1653 *does not impose any time limitations* on the allowance of amendments correcting jurisdictional allegations, and in fact authorizes such amendments in the appellate courts." 61B AM. JUR. 2D *Pleading* § 806 (2007) (emphasis added). Furthermore, 28 U.S.C. § 1653 applies to removed actions. Barrow, 418 F.2d at 317. Accordingly, under 28 U.S.C. § 1653, a notice of removal can be amended to "clarify defective allegations of jurisdiction previously made" at any time. See id. Therefore, this action should not be remanded. Defendants can still cure the Removal Notice's defective allegations regarding Wachovia's citizenship. Indeed, Defendants have sought leave of this Court to do just that. Supra, n.2, at 2.

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2. The Removal Notice's Allegations Regarding Wachovia's Citizenship Are Merely "Defective" Allegations Requiring Clarification.

Defective allegations arise when "the defendant sets forth the proper statutory basis and legal theory of removal, but fails to specify all the facts necessary to support such removal." Smiley v. Citibank (S.D.), N.A., 863 F. Supp. 1156, 1161 (C.D. Cal. 1993) (citations omitted). Accordingly, Defendants' allegations regarding Wachovia's citizenship are merely defective. Defendants set forth the proper statutory basis for removal, 28 U.S.C. § 1446, and the legal theory for removal, i.e., that Wachovia and Plaintiff were citizens of different states. However, the Removal Notice failed to specify all the necessary facts to support the removal, namely, the citizenship of each of Wachovia's members as required by the Ninth Circuit's recent opinion in Johnson.

Barrow is particularly instructive on why Defendants should be permitted to cure the Removal Notice's failure to allege each of Wachovia's members' citizenship. In Barrow, defendant corporation (the "Corporation") removed a state court case on diversity grounds. 418 F.2d at 317. The Corporation's removal petition only alleged the Corporation was a New York citizen and that plaintiff (another corporation) was an Alaskan citizen. Id. at n.1. However, the Corporation failed to allege either parties' respective states of incorporation and principal places of business. Id. On appeal, the Ninth Circuit questioned the sufficiency of the Corporation's showing of diversity. Id. at 317. The Corporation sought leave to amend its removal petition under 28 U.S.C. § 1653. Id. The Corporation's motion to amend and attached exhibits directly showed the plaintiff and the Corporation were incorporated respectively in Alaska and New York and that each had its principal place of business in its state of incorporation. See id. (noting plaintiff/appellant did not dispute facts appearing in verified exhibits appended to Corporations' motion).

The Ninth Circuit found the Corporation's allegation regarding the parties' citizenships merely defective and allowed the amendment. Barrow, supra, 418 F.2d at

318. The court conceded the Corporation's removal petition's failure to allege each party's state of incorporation and principal place of business was inadequate under the legal standards for alleging corporate citizenship. Id. Nonetheless, the court treated the Corporation's allegations "as defective in form but not so lacking in substance as to prevent their amendment." Id. The court refused to follow authority either requiring strict construction of removal statutes against the Corporation or treating the Corporation's allegations "as legal nullities and hence not susceptible to amendment." Id. (citations omitted). In doing so, the Barrow court explained:

> We are not unmindful of numerous district court opinions which question the power to allow such amendments under varying circumstances after the time for initially filing removal petitions has expired. But if applied to circumstances comparable to those of the present case, we believe that their reasoning would be too grudging with reference to the controlling statute, too prone to equate imperfect allegations of jurisdiction with the total absence of jurisdictional foundations, *and would tend unduly to exalt form over substance and legal flaw-picking over the orderly disposition of cases properly committed to federal courts.*

418 F.2d at 318 (emphasis added) (citations omitted).

In other words, the Ninth Circuit concluded that since complete diversity of the parties existed in fact, it would permit amendment. See also, Harmon v. Oki Sys., 115 F.3d 477, 479 (7th Cir. 1997) (explaining an allegation which fails to "*demonstrate* diversity" is only defective if the "record discloses [a] dispute that [diversity] in fact *existed*.") (citing In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993) (emphasis in original).

Under these principles, this Court should deny Plaintiff's request to remand this action. Defendants can, and have, sought leave of this Court to amend the Removal Notice's defective allegations regarding Wachovia's citizenship. Furthermore, it is clear there is no dispute that diversity exists in fact with respect to Plaintiff and Wachovia under the Johnson standard. See 437 F.3d at 899.

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3. This Court Can Consider Later Filed Declarations Which Clarify The Removal Notice's Defective Allegations Regarding Wachovia's Citizenship.

When reviewing amendments to notices of removal under 28 U.S.C. § 1653, courts should consider evidence that "sheds light on the situation which existed when the case was removed." Harmon, 115 F.3d at 479–80 (finding plaintiff's argument that court's review of defendant's amended removal papers under 28 U.S.C. § 1653 was limited to the evidence in the record when removal is sought "imprudent"). Furthermore, limiting a district court's review under 28 U.S.C. § 1653 to the notice of removal and the motion to amend the notice is "erroneous." Audubon Soc'y, 496 F. Supp. at 503. Thus districts courts can review later filed declarations which serve to amend a notice of removal. See id. (explaining how under 28 U.S.C. § 1653 it is proper to treat a notice of removal as if it had been amended to include the relevant information contained in later-filed affidavits) (citing Willingham v. Morgan, 395 U.S. 402, 407 n.3 (1969)).[3]

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[3] Some Ninth Circuit cases suggest that when ruling on a remand motion, courts generally determine removability from the complaint and removal notice as they existed at the time of removal. See 2 SCHWARZER, TASHIMI & WAGSTUTTE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 2:1096 (2007) (citing Gaus v. Miles, 980 F.2d 564, 567 (9th Cir. 1992), and Miller v. Grgurich, 763 F.2d 372, 373 (9th Cir. 1985)). Neither Gaus nor Miller apply to Defendants' motion to amend the Removal Notice, and therefore are of no moment with respect to this Opposition. First, neither case reviewed motions to amend removal notices under 28 U.S.C. § 1653. See Gaus, 980 F.2d at 565–66 (in response to court's concerns regarding defendant's "amount in controversy" allegation, defendant only responded that Nevada Rule of Civil Procedure 8(a) prohibited plaintiff's demand for a specific amount above $10,000); see also, Miller, 763 F.2d at 373. Second, a closer review of the cases reveals they support a court's review of post-removal evidence. See, Gaus, 980 F.2d at 567 ("If [a party's jurisdictional allegations] are challenged by his adversary . . . he must support them by *competent proof*.") (emphasis added). Notably, in Miller, even though the Ninth Circuit found that "on the face of the pleadings in [that] case [that there were] substantial [questions] concerning the plaintiff's citizenship at the time of removal," the Ninth Circuit remanded the case to the District Court (not the state court) to determine whether "diversity" had been established. Miller, 763 F.2d at 373.

Paul Waldman and Kenneth Meister's Declarations in support of this Opposition "shed light" on why this Court should deny Plaintiff's request to remand this action. Since before July 13, 2007 and through the present, Wachovia's sole member, WSFH, has been a citizen of state other than California. WSFH was organized under the laws of the State of Delaware. (Waldman Decl., ¶ 5.) WSFH's principal place of business is located in Richmond, Virginia. (Waldman Decl., ¶ 5.) Furthermore, on since before July 13, 2007, WSFH's two members, WSH and PSG were non-California citizens. First, WSH has been organized under the laws of the State of Delaware since before July 13, 2007. (Waldman Decl., ¶ 7.) WSH's principal place of business is located in Charlotte, North Carolina. (Waldman Decl., ¶ 7.) Second, PSG was incorporated under the laws of the State of Delaware. (Meister Decl., ¶ 4.) PSG's principal place of business is located in New York.[4] (Meister Decl., ¶ 4.) Additionally, WSH's sole member, Everen, has been a citizen of state other than California since before July 13, 2007. Everen was incorporated under the laws of the State of Delaware and its principal place of business is located in Charlotte, North Carolina.[5] (Waldman Decl., ¶ 9.) In short, none of these entities, the corporate parents of Wachovia, are citizens of California.

Critically, Paul Waldman and Kenneth Meister's Declarations in Support of Opposition to Plaintiff's Motion to Remand and Motion for Leave to Amend Removal Notice provide the same evidence which the Ninth Circuit found sufficient to support diverse citizenship of an LLC in Johnson. See 437 F.3d at 899 (finding affidavit of LLC's officer regarding LLC's members' states of incorporation and principal places of business evidence of diverse citizenship). Therefore, through Paul Waldman and Kenneth

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[4] As PSG is a corporation, the analysis ends here as to this member. There is no need to look further and examine the citizenship of PSG's members. See United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 763 (9th Cir. 2002) ("a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.") (citations omitted); C.T. Carden v. Arkoma Associates, 494 U.S. 185, 188–189 (1990) (confirming the well established rule that a corporation may be considered a citizen of the state which created it).

[5] As Everen is a corporation, the analysis of its citizenship ends here.

Meister's Declarations, Defendants have met their burden of proving removal of Plaintiff's state court action was appropriate. See id.; see also, United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 764 (9th Cir. 2002) (holding affidavits of knowledgeable company officials specifying the state of incorporation and principal place of business supported district court's denial of motion to remand). Accordingly, this Court should deny Plaintiff's Motion to Remand.

B. REMOVAL OF THIS ACTION WAS NOT "PROCEDURALLY IMPROPER" BECAUSE TBIG HAD LEGAL CAPACITY TO JOIN IN DEFENDANTS' REMOVAL NOTICE.

1. TBIG Had Capacity To Join In Defendants' Removal Notice Because Revocation Of A Corporation Does Not Terminate Its Existence.

Dr. Ettare seeks to have this matter remanded alleging that "TBIG was incapable of filing a notice of joinder on August 27 when this action was removed due to its status as a revoked Nevada corporation on that date." (See Memorandum of Points and Authorities in Support of Motion to Remand, at p. 5.) However, the revocation of a corporation's charter by a state's administration does not preclude that company from being sued and defending itself in a lawsuit. In Clipper Air Cargo Inc. v. Aviation Products International, Inc., the case applying Nevada law cited by Plaintiff, the court held that "revocation does not immediately terminate the corporation's existence." 981 F. Supp. 956 (D.S.C. 1997). Indeed, Clipper Air held that a revoked corporation should be treated as a dissolved corporation, which retained the capacity to sue and be sued. Id. at 958–59 n.3, 4 & 5. Therefore, TBIG had capacity to appear in this matter and join in the Removal Notice. See Wild v. Subscription Plus, Inc., 292 F.3d 526, 528–29 (7th Cir. 2002) (finding that the revocation of Subscription Plus's corporate charter did not affect its status for diversity purposes, and that "[m]ost states sensibly permit a corporation whose charter has been revoked to continue nevertheless to operate as a

corporation, specifically for the purpose of suing and being sued."). See also 16A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 3844 (2007).

If Dr. Ettare were correct in her allegation at page 5 of the Memorandum of Points and Authorities in Support of Motion to Remand, and "TBIG was incapable of filing a notice of joinder, or otherwise participating in this litigation," including TBIG in this suit would be meaningless. In that case, it would be irrelevant that TBIG didn't have legal capacity to join Defendants' Removal Notice, complete diversity of the parties would still exist, and removal to this court would be appropriate.

2. The Reinstatement Of TBIG'S Corporate Status In Nevada Is Retroactive And Validates Its Joinder In The Notice Of Removal.

Dr. Ettare concedes that TBIG reinstated its corporate charter shortly after removal, on August 31, 2007, but sustains that Nevada law is silent of that point, and therefore, reinstatement should apply prospectively, and not retrospectively. Dr. Ettare is mistaken. Under Nevada law, even if TBIG lacked capacity to join in Defendants' Notice of Removal on August 27, 2007, the reinstatement of TBIG's Nevada corporate status on August 31, 2007 operates retroactively and validates TBIG's joinder in the Removal. NEV. REV. STAT. § 78.180(5).[6]

Nevada Revised Statute section 78.180(5) establishes that reinstatement of a corporation pursuant to that statute "*relates back* to the date on which the corporation forfeited its right to transact business under the provisions of this chapter and reinstates the corporation's right to transact business *as if such right had at all times remained in full force and effect*." (NEV. REV. STAT. § 78.180(5) (emphasis added).) Thus, the reinstatement of TBIG's corporate status on August 31, 2007 relates back to November 1,

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[6] Subsection (5) of Nevada Revised Statute section 78.180 was approved by the Governor of Nevada on June 13, 2007. See 2007 Nevada Laws Ch. 456 (S.B. 483).

2002, the date it was revoked, and validates TBIG's acts as if the corporation had never fallen out of status—including its joining the Removal Notice.

The retroactive effect of Nevada law is not contrary to 28 U.S.C. § 1446(b) because it does not extend the 30-day period to seek removal. TBIG did in fact seek removal on August 27. Assuming for sake of the argument that TBIG did not have capacity to join Wachovia and Wieland on that day, it gained such capacity on August 31, when it reinstated its right to transact business "as if such right had at all times remained in full force and effect" NEV. REV. STAT. § 78.180(5). Thus, TBIG's August 27 joinder had the same effect it would if TBIG's status had never been revoked.

Lastly, it is undisputed that TBIG's corporate charter now has been reinstated. Therefore, it was fully capable of joining Defendants' request for leave to amend the Removal Notice.

C. PLAINTIFF'S MOTION TO REMAND SHOULD BE DENIED BECAUSE DEFENDANTS HAVE ESTABLISHED COMPLETE DIVERSITY OF THE PARTIES.

The doubts cast by Dr. Ettare concerning TBIG's citizenship are nothing but speculations, and are nevertheless rebutted by Baratta's Declaration in Support of Defendants' Motion for Leave to Amend and Opposition to Plaintiff's Motion to Remand.

Dr. Ettare alleges that at the time removal was sought, TBIG was a citizen of California because its principal place of business has been in California, and not Nevada. Dr. Ettare bases that allegation on the fact that TBIG's form ADV from 2005, attached to Cooke's Declaration in Support of the Motion to Remand, sets forth 650 area code telephone numbers, but does not identify a business address in California or Nevada. Dr. Ettare also alleges that she first encountered TBIG and Baratta in California, where she resides, and where Baratta maintains a residence.

As set forth in the Removal Notice, and confirmed by Baratta's Declaration filed concurrently herewith, TBIG is a citizen of Nevada, and Nevada only, because it is

both incorporated in that state *and* maintains its principal place of business in Incline Village, Nevada. (Baratta Decl., ¶¶ 5, 6; Exhibits A, B and C.) TBIG does not, and has not in a very long time, conducted its business from California. In fact, TBIG's California corporation merged into the Nevada corporation in November 2000, and Baratta has been a Nevada resident since at least 2001. (Baratta Decl., ¶¶ 3, 6; Exhibit C.)

Like TBIG's corporate filings with the State of Nevada, TBIG's form ADV does set forth its principal place of business in Incline Village, Nevada. (Baratta Decl., Exhibit B.) The fact that the form ADV lists a 650 area code number is irrelevant. That is a cellular phone billed to Baratta's address in Nevada, which works internationally and replaced TBIG's previous 877 number. (Baratta Decl., ¶ 8.) The 650 numbers contained on Schedule D, page 1 of the form ADV, attached as Exhibit A to Cooke's Declaration, relate to the location where TBIG kept certain books and records *other* than its principal place of business. Those numbers are no longer utilized by TBIG. (Baratta Decl., ¶ 8.)

That Plaintiff alleges she first met TBIG and Baratta in California is not surprising since she resides in California and Baratta spent considerable time there in 2001 when she opened her Wachovia account. But that bears no relevance to TBIG's or Baratta's citizenship at the time the Complaint was filed and on the date removal was sought. See Stortek Corp. v. Air Transport Ass. of Am., 300 F.3d 1129, 1131 (9th Cir. 1986).

Since none of the Defendants are California residents Dr. Ettare's Motion to Remand should be denied.

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IV.

CONCLUSION

In light of the foregoing, Defendants request that this Court deny Dr. Ettare's motion to remand.

DATED: October 29, 2007

/s/ Terry Ross
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DATED: October 29, 2007

/s/
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